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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 616

In the Matter of

A & S-ELECTRIC CORP., Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL
INDUSTRY and WARREN C. SCHWARTZ, Trustee
in Bankruptcy of A & S ELECTRIC CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF FOR THE TRUSTEE IN BANKRUPTCY
OF A & S ELECTRIC CORP. BANKRUPT**

MAX SCHWARTZ,
26 Court Street,
Brooklyn, New York,
Attorney for Trustee.

MAX SCHWARTZ,
WARREN C. SCHWARTZ,
of Counsel.

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Opinion Below

The opinion of the United States Court of Appeals
for the Second Circuit is recorded in 378 F. 2d 211 (1967).

Jurisdiction

The jurisdiction of this court has been invoked under
Title 28, United States Code, Section 1254 (1).

Question Presented

Whether employer contributions to a union annuity fund, pursuant to a collective bargaining agreement, which are credited in full to the individual accounts of the employees, are wages entitled to priority under § 64 a (2) of the Bankruptcy Act?

Statute Involved

Bankruptcy Act, c 541, 30 Stat. 544; 11 U.S.C. 104:

Sec. 64, Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (2) wages and commissions, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, * * *; (4) taxes which became legally due and owing by the bankrupt to the United States.

Statement

A & S Electric Corp. filed a petition under Chapter XI, section 322, on January 9, 1963, and was adjudicated a bankrupt on November 6, 1963.

During the pendency of the Chapter XI proceedings, the Joint Industry Board of the Electrical Industry filed a proof of claim for the total sum of \$10,537.34 (R45a-R49a).¹ This was the only priority wage claim filed in the proceeding.

The United States, by Director of Internal Revenue, Brooklyn, N.Y., filed a proof of claim for internal revenue taxes owing in the sum of \$15,587.55 (R27a).

¹ "R." references are to the Appendix to the brief of the Joint Industry Board of the Electrical Industry to the Court of Appeals.

The trustee and the Joint Industry Board of the Electrical Industry entered into a stipulation whereby they agreed to allow the claim of the Joint Industry Board for contributions owing to the Annuity Fund, in the sum of \$5,114 as priority, and disposing of the balance of the claim which is not at issue here (R29a-30a). That said sum of \$5,114 is the total amount owed to the annuity fund on the account of 39 workmen of the bankrupt and none of these accounts are owed in excess of \$600 (R38a-R39a).

The Referee in Bankruptcy decided that the contribution to the annuity fund were not entitled to priority (R28a).

The assets in the hands of the trustee will be insufficient to pay both the claim of the Joint Industry Board and the Director of Internal Revenue, if the former claim is allowed as priority.

The Annuity Plan at issue is set forth in full in the appendix (R53a). The plan provides for a per diem contribution to the account of employees for each day worked (R53a, ¶ 5a), crediting these sums to account of individual workmen (R53a, ¶ 5b) ultimate payment to the workman upon retirement or death (R53a, ¶ 7 (a) (5), (6), (b), (c), (d) (1) (2) (3) (4)).

Summary of Argument

The issue presented is whether unpaid employer contributions to a union annuity fund, pursuant to a collective bargaining agreement, and payable to the individual accounts to the bankrupt's workmen constitute wages within the meaning of the Bankruptcy Act Section 64a (2). Relying upon *U.S. v. Embassy Restaurant Inc.*, and *Sulmeyer v. Southern California Pipe Trades Trust Fund*, we believe the contributions to the fund are wages.

ARGUMENT

The claim of the Joint Industry Board of the Electrical Industry on behalf of employee members for contributions due its Annuity Fund is entitled to priority under Section 64a(2) of the Bankruptcy Act.

The Bankruptcy Act section 64a (2) grants priority status to "wages . . . due to workmen." The act grants a special status to employees who have not been paid, in an attempt to assure the workingman payment for his services, prior to tax claims and other creditors.

This court has heretofore held that payments to a union welfare fund are not wages, within the meaning of § 64a (2) of the Bankruptcy Act, *U.S. v. Embassy Restaurant Inc.*, 359 U.S. 29 (1959). The court noted in *Embassy*,

- a) the contributions were a flat sum per month, without relationship to the workmen's wages.
- b) the workmen had no legal interest in the fund.
- c) the agreement was enforceable solely by the trustees who had exclusive management of the funds.
- d) the fund offered no support to workmen in periods of financial distress.
- e) the agreement did not consider the contributions as wages.

The instant annuity fund is far different factually from the welfare fund in *Embassy Restaurant*.

- 1) The monies owed by the bankrupt are due on the account of individual workmen, computed on the number of days worked.
- 2) Each workman has an individual account with the fund.
- 3) The monies contributed are only for his benefit and are inviolate; they will be paid only to him or his estate.

- 4) The monies contributed are taxable. Taxes are not avoided but merely delayed until retirement, when the monies are paid to the employee, and then are fully taxable.
- 5) The fund is designed to pay employee's an annuity upon retirement. When the employee retires the contributions made on his behalf become payable. Thus providing income for his retirement years, when money is needed.

In *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F 2d 768 (9 Cir., 1962) the Court of Appeals held monies owed to a union vacation fund to be wages entitled to priority status. The amount due was a percentage of wages. The trustees supervised the funds, but each workman's rights are fixed. The contributions made were after deduction for taxes.

The instant matter is identical with *Sulmeyer*. The amount of contributions is based upon days worked, rather than a percentage, the workmen's interest is fixed, though taxes are not immediately paid, the contributions are ultimately taxed when paid to the workmen.

Those fringe benefits cannot be looked upon as anything other than wages. They are clearly part of the agreed compensation between workmen and their employers. As such they are entitled to priority.

CONCLUSION

This court should reverse the order of the court below and should rule that the claim filed by the Joint Industry Board of the Electrical Industry on behalf of its participants in this annuity fund is entitled to priority under Section 64a(2) of the Bankruptcy Act.

Respectfully submitted,

MAX SCHWARTZ,
Attorney for Trustee in Bankruptcy
of A & S Electric Corp. bankrupt.

Of Counsel:

MAX SCHWARTZ,

WARREN C SCHWARTZ.